

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

NEVADA RESTAURANT SERVICES, INC., )  
d/b/a DOTTY'S, )

Plaintiff, )

vs. )

CITY OF LAS VEGAS, CITY COUNCIL OF )  
LAS VEGAS, )

Defendants. )

Case No.: 2:15-cv-02240-GMN-GWF

**ORDER**

Pending before the Court is Plaintiff Nevada Restaurant Services, Inc.'s ("Plaintiff's") Motion for Jury Trial and Advisory Jury, (ECF Nos. 85, 86). Defendants City of Las Vegas and City Council of Las Vegas, (collectively "Defendants"), filed a Response, (ECF No. 96), and Plaintiff filed a Reply, (ECF No. 99).<sup>1</sup>

Also pending before the Court is Defendants' Motions in Limine, (ECF No. 89), to which Plaintiff filed a Response, (ECF No. 97).<sup>2</sup>

**I. BACKGROUND**

This case arises out of Defendants' issuance of a permanent restricted gaming license to Plaintiff for its Store #110, located at 10000 West Sahara Avenue, Suite 100, Las Vegas, NV 89117 ("Store #110"), which allowed only seven gaming machines rather than the fifteen

<sup>1</sup> Also pending before the Court is Defendants' Motion for a Pre-trial Order, (ECF No. 107), concerning which questions will be tried before a jury based on Plaintiff's remaining claims. That Motion is not ripe for a decision at this time. The Court will, however, address Defendant's Motion for Pre-trial Order at calendar call scheduled for February 4, 2019.

<sup>2</sup> Also pending before the Court is Plaintiff's Motion to Supplement the Record, (ECF No. 83). Defendants filed a Response, (ECF No. 93), and Plaintiff filed a Reply, (ECF No. 98). The Court will address this Motion during calendar call to discuss the extent that certain documents were "presented to" the City of Las Vegas and thus may supplement the current administrative record provided to the Court. *See Consol. Municipality of Carson City v. Lepire*, 914 P.2d 631, 632-33 (1996).

1 machines sought by Plaintiff. (Compl. ¶ 49, ECF No. 1). On November 25, 2015, Plaintiff filed  
2 its Complaint in this Court, including six causes of action: (1) Petition for Writ of Mandamus,  
3 (2) Judicial Review, (3) Equal Protection Violation, (4) Violation of 42 U.S.C. § 1983, (5)  
4 Injunctive Relief, and (6) Declaratory Relief. (*See id.* ¶¶ 50–89). Plaintiff asserts that the  
5 reduction of its gaming machines from the fifteen to seven was arbitrary and capricious, and  
6 that it was treated differently than other similarly situated establishments. (*Id.* ¶¶ 40–48).

7 On March 31, 2017, the Court granted in part and denied in part Defendants’ motion for  
8 summary judgment, dismissing Plaintiff’s general equal protection claim and finding that there  
9 were genuine issues of fact for the other causes of action. (Order 11:2–5, ECF No. 50).  
10 Plaintiff now requests that the Court order the writ of mandamus claim be tried before a jury,  
11 and order an advisory jury for the judicial review claim. (Mot. Jury Trial 2:20–27, ECF No.  
12 85). Additionally, Defendants, in their motion in limine, request that the Court preclude  
13 Plaintiff from calling City Council Members to testify during trial about their motivations and  
14 rationales for their votes on Plaintiff’s gaming license application. (Mot. Lim. 3:2–8, ECF No.  
15 89).

## 16 **II. LEGAL STANDARD**

### 17 **A. Motion for Jury Trial**

18 Nevada Revised Statute 34.220 governs the use of a jury for writs of mandamus, and it  
19 provides:

20 If an answer is made, which raises a question as to matter of fact essential to the  
21 determination of the motion, and affecting the substantial rights of the parties, and  
22 upon the supposed truth of the allegation of which the application for a writ is  
23 based, the court may, in its discretion, order the question to be tried before a jury,  
and postpone the argument until such trial can be had and the verdict certified to  
the court.

24 Under Federal Rule of Civil Procedure 39(c)(1), in an action not triable by right to a jury  
25 the court “may try any issue with an advisory jury[.]” If an advisory jury is empaneled, the

1 court is free to accept or reject the advisory jury’s findings, in whole or in part, and is obligated  
2 to make its own independent assessment of the issues submitted to the advisory jury. *Ashland v.*  
3 *Ling–Temco–Vought, Inc.*, 711 F.2d 1431, 1438 (9th Cir. 1983); *see also OCI, Wyoming v.*  
4 *PacifiCorp*, 479 F.3d 1199, 1206 (10th Cir. 2007).

### 5 **B. Motion in Limine**

6 In general, “[t]he court must decide any preliminary question about whether . . .  
7 evidence is admissible.” Fed. R. Evid. 104(a). In order to satisfy the burden of proof for  
8 Federal Rule of Evidence (“FRE”) 104(a), a party must show that the requirements for  
9 admissibility are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483  
10 U.S. 171, 175 (1987) (“We have traditionally required that these matters [regarding  
11 admissibility determinations that hinge on preliminary factual questions] be established by a  
12 preponderance of proof.”).

13 “Although the [FRE] do not explicitly authorize in limine rulings, the practice has  
14 developed pursuant to the district court’s inherent authority to manage the course of trials.”  
15 *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) (citing FRE 103(c)). In limine rulings “are  
16 not binding on the trial judge, and the judge may always change his mind during the course of a  
17 trial.” *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000); *see also Luce*, 469 U.S. at 41  
18 (noting that in limine rulings are always “subject to change,” especially if the evidence unfolds  
19 in an unanticipated manner). To exclude evidence on a motion in limine, the evidence must be  
20 “clearly inadmissible on all potential grounds.” *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d  
21 844, 846 (N.D. Ohio 2004).

## 22 **III. DISCUSSION**

### 23 **A. Plaintiff’s Motion for Jury Trial and Advisory Jury**

24 Plaintiff requests a jury trial for its writ of mandamus claim to address an outstanding  
25 question of fact: whether Plaintiff was treated differently than similarly situated taverns. (*See*

1 Order 9:20–22, 10:16–18, ECF No. 50); (Mot. Jury Trial 3:15–24, ECF No. 85). Nevada  
2 Revised Statute 34.220 governs the use of a jury for a writ of mandamus claim, and it states “if  
3 an answer is made, which raises a question as to a matter of fact essential to the determination  
4 of the motion . . . the court may, in its discretion, order the question to be tried before a jury.  
5 Nev. Rev. Stat. 34.220. However, Plaintiff does not provide supporting reasons to guide the  
6 Court’s discretion in ordering a jury trial on the limited factual issue in this case. (*See* Mot. Jury  
7 Trial 3:5–24, ECF No. 85); (Reply 2:21–315, ECF No. 99). By contrast, Defendants explain  
8 that a jury may confuse the issues before the Court or invite error, because a jury may go  
9 beyond the limited role of a reviewing court in a writ of mandamus claim, which is to only  
10 consider the “evidence presented to” the City Council. *Consol. Municipality of Carson City v.*  
11 *Lepire*, 112 Nev. 363, 364–65 (1996). While the Court can limit that potential error by  
12 permitting the jury to only consider the City Council record, the risk of any jury error and the  
13 absence of benefits weighs against ordering a jury trial. Accordingly, the Court will not  
14 exercise its discretion to order a jury trial for Plaintiff’s writ of mandamus claim.

15 The Court similarly declines to order an advisory jury for Plaintiff’s writ of mandamus  
16 and judicial review claims. Though Federal Rule of Civil Procedure 39(c)(1) authorizes courts  
17 to “try any issue with an advisory jury” even if an action is not triable by a binding jury,  
18 Plaintiff does not identify benefits that an advisory jury would bring to this case. Even if the  
19 Court were to order an advisory jury, the Court nonetheless “has the ‘ultimate responsibility’  
20 for deciding the case’s legal and factual issues.” *OCI Wyoming, L.P. v. PacifiCorp*, 479 F.3d  
21 1199, 1206 (10th Cir. 2007). An advisory jury thus may needlessly complicate the trial in this  
22 matter, which leads the Court to deny Plaintiff’s request to empanel an advisory jury. *Van*  
23 *Asdale v. Int’l Game Tech.*, No. 3:04-cv-703-RAM, 2010 WL 1490349, at \*7 (D. Nev. Apr. 13,  
24 2010), *aff’d sub nom. Asdale v. Int’l Game Tech.*, 549 F. App’x 611 (9th Cir. 2013).

1           **B. Defendants' Motion in Limine, ECF No. 89**

2           Defendants, in their Motion in Limine, (ECF No. 89), seek to preclude Plaintiff from  
3 calling the following City Council Members to testify at trial about their purposes or  
4 motivations for their votes on Plaintiff's license: Mayor Carolyn Goodman, former Mayor Pro  
5 Tem Steven D. Ross, former Councilman Ricki Y. Barlow, Councilman Bob Coffin, Mayor Pro  
6 Tem Lois Tarkanian, former Councilman Bob Beers, and Councilman Stavros Anthony. (Mot.  
7 Lim. 2:20–23, ECF No. 89). Defendants argue that federal courts are “reluctant to allow  
8 inquiry into the mental processes of legislative, administrative or executive decision makers,”  
9 and that this case warrants application of that general rule. (*Id.* 3:3–5:23) (citing *City of Las*  
10 *Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984), and *Federal Commc'ns Comm'n v. Beach*  
11 *Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)).

12           Conversely, Plaintiff argues that Defendants waived the ability to preclude testimony  
13 from current or former City Council Members because several Members have already been  
14 deposed in this case. (Resp. 4:5–18, ECF No. 97). Plaintiff further argues that the Court should  
15 not prevent current or former City Council Members from testifying because their testimony is  
16 directly relevant to, and highly probative of, the elements of Plaintiff's class-of-one equal  
17 protection claim. (*Id.* 4:21–2).

18           Addressing Plaintiff's waiver argument, Plaintiff does not explain the context and extent  
19 to which City Council Members already testified in depositions about their actions with  
20 Plaintiff's gaming license application. The Court thus cannot fully evaluate waiver at this time.  
21 *Thompson v. City of N. Las Vegas*, 833 P.2d 1132, 1134 (Nev. 1992) (“In order to be effective,  
22 a waiver must occur with full knowledge of all material facts.”); *see Gary G. Day Constr. Co.*  
23 *v. Clarendon Am. Ins. Co.*, 459 F. Supp. 2d 1039, 1049 (D. Nev. 2006). The Court reserves the  
24 ability to revisit this issue, if needed, based on circumstances that arise at trial.  
25

1           Next, concerning Plaintiff’s relevance argument about the testimony of City Council  
2 Members’ motives and intentions, for Plaintiff to succeed on its class-of-one equal protection  
3 claim, it must prove that Defendants: (1) intentionally, (2) treated Plaintiff differently than  
4 others similarly situated, (3) without a rational basis. *Gerhart v. Lake Cty., Mont.*, 637 F.3d  
5 1013, 1022 (9th Cir. 2011) (citations omitted). For the first element of intentional conduct, a  
6 plaintiff does not need to demonstrate “subjective ill will.” *Id.* at 1022. Rather, a plaintiff needs  
7 to show that a defendant “intended to treat him differently from other applicants,” which can be  
8 shown through testimony of objective facts rather than subjective motivations. *Id.*

9           Against the backdrop of these elements, City Council Members’ testimony about their  
10 actions could directly help prove the required element of disparate, intentional conduct by City  
11 Council Members toward Plaintiff’s gaming license application. City Council Members’  
12 testimony may also help demonstrate arbitrary, irrational conduct. *See Valley Outdoor, Inc. v.*  
13 *City of Riverside*, 446 F.3d 948, 955 (9th Cir. 2006). Thus, such testimony is directly relevant  
14 to Plaintiff’s class-of-one equal protection claim.

15           The next issue, then, is the extent to which Plaintiff should be allowed to question City  
16 Council Members about their subjective intentions and motivations, even though such inquiry  
17 “is usually to be avoided.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420  
18 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *see, e.g., Vill.*  
19 *of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (“In some  
20 extraordinary instances the members might be called to the stand at trial to testify concerning  
21 the purpose of the official action, although even then such testimony frequently will be barred  
22 by privilege.”). Courts have, in some instances, allowed testimony from officials about their  
23 motivations in the context of equal protection claims against city council members. *Cf. N.*  
24 *Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1126 (N.D. Cal. 2003). For example,  
25 in *North Pacifica, LLC v. City of Pacifica*, the court evaluated the permissible scope of

1 testimony from city council members about the motive and intent of their decision-making  
2 process when those members created a condition of approval for a proposed condominium  
3 project. 274 F. Supp. 2d at 1120. The court weighed the need for such testimony in light of  
4 privilege, and ultimately permitted testimony from city council members in the limited form of  
5 “objective manifestations of the decision-making process.” The *North Pacifica* Court  
6 identified permissible areas of examination, including: questioning city council members about  
7 “what they heard, what they read, [and] what they were told” about the proposed project and  
8 the condition of approval; and what city council members said to others about the proposed  
9 project and the condition of approval. *Id.* at 1124–25. The court’s primary reason for allowing  
10 the limited testimony was the need for that evidence with the plaintiff’s equal protection claim  
11 balanced against the availability of analogous evidence from other sources. *Id.* at 1124.

12 Here, Plaintiff may require more than the administrative record to establish its equal  
13 protection claim, such as testimony from City Council Members. Further, as discussed above,  
14 that testimony could reveal facts directly relevant to the disputed elements in Plaintiff’s class-  
15 of-one equal protection claim. Accordingly, the Court preliminarily will permit Plaintiff to  
16 elicit testimony from City Council Members, but will limit such testimony to objective  
17 circumstances surrounding their decision-making process for Plaintiff’s license application.  
18 For example, Plaintiff may, within the applicable Federal Rules of Evidence, question City  
19 Council Members about: the procedural handling of Plaintiff’s license application; and  
20 disparities between Plaintiff’s application process and other applicants. *See City of Las Vegas v.*  
21 *Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984) (explaining approved forms of testimony by city  
22 council members after analyzing the decision of *Tovar v. Billmeyer*, 721 F.2d 1260, 1262 (9th  
23 Cir. 1983)).<sup>3</sup> By contrast, at this time the Court will not allow Plaintiff to inquire about the

---

24  
25 <sup>3</sup> Plaintiff states that its intention to seek testimony from City Council Members is “with respect to Dotty’s equal protection claim.” (Resp. 2:21–23, ECF No. 97). The Court’s decision on Defendant’s Motion in Limine, (ECF No. 89), is thus limited to that context.

1 subjective mental impressions or processes of City Council Members. Plaintiff has not  
2 supported its present need to take such action in light of the availability of comparable  
3 evidence.<sup>4</sup>

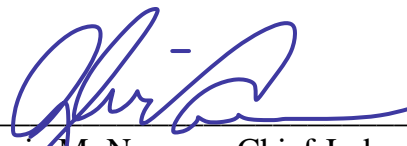
4 Altogether, Plaintiff has not currently provided sufficient support to show that its equal  
5 protection claim justifies intrusion into the mental processes of City Council Members. *See Lee*  
6 *v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018). The Court reserves the ability,  
7 however, to revisit the extent of permissibility at trial should it become clear that the objective  
8 evidence is inadequate. *See N. Pacifica, LLC*, 274 F. Supp. 2d at 1126.

9 **IV. CONCLUSION**

10 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Jury Trial and Advisory jury,  
11 (ECF No. 85, 86), is **DENIED**.

12 **IT IS HEREBY ORDERED** that Defendant's Motion in Limine, (ECF No. 89), is  
13 **DENIED in part and GRANTED in part**.

14 **DATED** this 4 day of February, 2019.

15  
16   
17 \_\_\_\_\_  
18 Gloria M. Navarro, Chief Judge  
19 United States District Court  
20  
21  
22  
23  
24

25 <sup>4</sup> Similarly, the Court does not opine at this time about Plaintiff's ability to make an inquiry even if there were additional support.